

Honorable Franklin D. Burgess

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

MICHAEL BRANNAN, Individually, as
Administrator of the estate of BARBARA
BRANNAN, deceased, and as Parent and Natural
Guardian for his minor children STEPHANIE
BRANNAN and RHIANNON BRANNAN,

Plaintiffs,

vs.

NORTHWEST PERMANENTE, P.C.; KAISER
FOUNDATION HEALTH PLAN OF THE
NORTHWEST; MINDY ROTHBARD, M.D.; and
MIKE G. LIN, M.D.,

Defendants.

No. 05-5157 FDB

DEFENDANTS' MOTION FOR
PROTECTIVE ORDER

Noted: Monday, June 5, 2006

I. RELIEF REQUESTED.

Defendants seek a protective order pursuant to Fed. R. Civ. P. 26(c)(1) preventing
production of personal and financial documents belonging to defense expert witness, Dr. William
Brady sought by plaintiffs in their Notice of Deposition to Dr. Brady.

II. STATEMENT OF FACTS PERTINENT TO THIS MOTION.

The defendants designated Dr. William Brady as an expert witness on one of the issues in this litigation. On May 12, 2006, the plaintiffs served on defendants a Notice of Deposition of Dr. William J. Brady scheduled for June 26, 2006 at 9:00 a.m. *See* Ex. A to Declaration of Paula T. Olson. Included in the notice was a request that Dr. Brady bring the following documents covering the time period of 2001 to the present:

1. All records reflecting the receipt of fees for services as an expert witness in any criminal or civil litigation;
2. All witness fees received for drafting of expert reports, appearance at depositions and appearance in court in any criminal or civil litigation;
3. Income tax returns for the calendar years 2001 through 2005 which reflect the sources of income reported;
4. All 1099 Forms reflecting the receipt of fees for the performance of duties as an expert witness.

Id. Defense counsel immediately advised plaintiffs' counsel of their objections to the scope and content of Dr. Brady's deposition notice pertaining to the requested documents. The parties, through their attorneys, discussed the nature of the defendants' objections, attempting to resolve the matter without court intervention. Their best efforts failed. *See* Olson Decl. For the reasons set forth herein, the defendants object to the production of the above listed documents and seek a protective order preventing their production.

III. LEGAL MEMORANDUM.

A. *Plaintiffs' requests for production of Dr. Brady's financial information violates the spirit and intent of Rule 26(a)(2).*

The rules of discovery of expert testimony are clearly set forth in Fed. R. Civ. P. 26(a)(2)(B), including the expert's report, the expert's qualifications, a list of all publications

1 authored by the expert in the past ten years, compensation to be paid for the study and testimony,
2 and a listing of cases in which the expert has testified in the preceding four years. The defendants
3 have provided all of this information regarding Dr. Brady to the plaintiffs. The plaintiffs, however,
4 are not satisfied with that. They wish to embark on a fishing expedition into Dr. Brady's personal
5 and financial affairs in the hopes of uncovering some impropriety or bias created by his previous
6 employment as an expert witness. Not only does the requested information violate Dr. Brady's
7 right to privacy, it is beyond what is intended or required by the rules of discovery.

8 Defendants further contend that the plaintiffs' request for the above listed documents is
9 oppressive, unduly burdensome, and will subject Dr. Brady to annoyance and embarrassment in
10 violation of Rule 26. Therefore, defendants seek a protective order pursuant to Fed. R. Civ. P.
11 26(c) and request that Dr. Brady be precluded from producing these documents.

12 The issue of discovery of personal and financial information from expert witnesses has not
13 been addressed by the Ninth Circuit and only one district court within the Ninth Circuit has
14 published an opinion on the matter. The issue has been decided in the District of Maryland and in
15 some state courts, which while not binding on this court, is nonetheless instructive on the approach
16 taken in a factually similar situation. None of these decisions allowed the production of personal
17 financial documentary information.

18 In *Rogers v. United States Navy*, 223 F.R.D. 553 (S.D. Calif 2004), the plaintiff sought
19 similar personal financial information from the defense expert, including income derived from
20 forensic work. The district court, relying on *Behler v. Hanlon*, 199 F.R.D. 553 (D.Md.2001) held
21 this was "overkill." *Id.* at 535 (emphasis added). The court further held that asking the defense
22 expert about the percentages of his forensic practice versus his usual practice, the percentages of
23 cases that involve plaintiffs versus defendants, and the percentage of his income that comes from
24 forensic work versus his clinical practice was sufficient information from which the jury could assess
25 any possible bias. *Id.* at 536-36. The court found that it was not necessary for the expert to

1 produce the specific dollar amounts.

2 The *Behler* decision contains an excellent discussion of the reasons why production of
3 personal and financial documents from an expert is overkill.

4 While there may be cases in which an expert's gross income, and the specific
5 amounts thereof earned by providing services as an expert witness, may be
6 discoverable, this should not be ordered routinely, without a showing, absent here,
7 why less intrusive financial information would not suffice. Most people are sensitive
8 about their income, and who knows the details about it. By their very nature, expert
9 witnesses are knowledgeable of information that is scientific, technical, or
10 specialized, generally acquired by long, hard study and experience. When asked to
11 provide expert testimony, they are in a position to request compensation that
12 matches their qualifications, which can seem shockingly high to those not familiar
13 with the costs of modern litigation. Moreover, in the post-*Daubert/Kumho Tire*
14 era, and in light of the Rule 26(a)(2) disclosure requirements and the recent changes
15 to Rules 702 and 703, counsel increasingly are more selective in who they ask to
16 be expert witnesses, knowing that they will be subject to the utmost scrutiny. Those
17 who pass muster likely will be able to command fees commensurate with their skill
and experience, which may, to a lay member of the jury, appear exorbitant, when
in fact what was charged is the going rate. Rule 26(a)(2)(B) requires disclosure of
the compensation received by a retained expert in the particular case at issue, and
counsel routinely bring this out during cross-examination when questioning an
opposing expert witness. However, permitting routine disclosure of the expert's
gross compensation, from all sources--including those unrelated to litigation
activities--would provide the jury with little information relevant to a fair assessment
of the expert's credibility, while concomitantly introducing the real possibility of
creating confusion, distraction and even prejudice. Nor is the trial of a case
facilitated if a party sponsoring an expert attempts to draw the possible sting of
expert compensation by attempting to prove that what his or her expert charges is
within the norm, as this opens the door for collateral issues that could further
distract the jury.

18 199 F.R.D. at 561-62. *Accord Marron v. Stromstad*, 123 P.3d 992 (Alaska 2005) (holding that
19 the experts' testimony regarding their litigation services and amounts of compensation was
20 sufficient); *Elkins v. Syken*, 672 So.2d 517, 522 (Fla. 1996) (endorsing a "reasonable balance
21 between a party's need for information concerning an expert witness's potential bias and the
22 witness's right to be free from burdensome and intrusive production requests."); *Wroblewski v.*
23 *Lara*, 353 Md. 509, 727 A.2d 930 (1999) (holding that harassment of expert witnesses through
24 a wholesale rummaging of their personal and financial records under the guise of seeking
25 impeachment evidence will not be permitted).

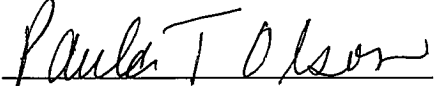
1 The plaintiffs have not made any showing as to why this case warrants production of the
 2 requested information. Although the plaintiffs believe that Dr. Brady testifies primarily for the
 3 defense, they will learn at his deposition that he is often employed by plaintiffs as an expert. The
 4 defendants agree that the plaintiffs can inquire of Dr. Brady the percentage of his practice
 5 comprises forensic work and the percentage of his gross income is derived therefore. Dr. Brady
 6 expects and is prepared to discuss the cases in which he provided expert services within the past
 7 four years, the percentage of his gross income that is derived from forensic services versus his
 8 medical practice, and the percentages of when he provides expert services for plaintiffs versus
 9 defendants. This information will give plaintiff more than sufficient fodder for cross examination and
 10 the jury sufficient information to assess Dr. Brady's possible bias. Requiring more will unnecessarily
 11 invade Dr. Brady's privacy, force the defendants to seek similar information from plaintiffs' experts
 12 thereby extending the trial with completely collateral and unimportant evidence to the primary issues
 13 in the case, and confuse the jury.

14 III. CONCLUSION.

15 For the reasons set forth herein, plaintiffs' requests for Dr. William Brady's personal and
 16 financial information is beyond the scope of discovery intended by Rule 26. Dr. Brady's response
 17 to questions pertaining to the percentages of his forensic practice and income provides sufficient
 18 information for the plaintiffs and the jury to assess the potential for any bias. The defendants seek
 19 a protective order pursuant to Fed. R. Civ. P. 26(c)(1) preventing the production of the documents
 20 sought by plaintiffs in their Notice of Deposition to Dr. Williams Brady.

21 Dated this 25th day of May 2006.

22 BURGESS FITZER, P.S.

23 
 24 PAULA T. OLSON, WSBA#11584
 25 Of Attorneys for Defendants

26 BURGESS FITZER, P.S.

ATTORNEYS AT LAW

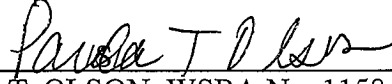
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CERTIFICATE OF SERVICE

I hereby certify that on May 25, 2006, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record. I hereby certify that no other parties are to receive notice.



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